United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

77-7212
77-7223

To be argued by
MARTIN I. SHELTON

United States Court of Appeals
For the Second Circuit

Docket No. 77-7212
Docket No. 77-7223

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

LEONARD DESSER, MELVIN DESSER and JACOB LANDESMAN,

Plaintiffs-Appellees-Appellants,

against

ROY A. ASHTON,

Defendant-Appellant-Appellee,

and

JAMES YOUNGBLOOD and TRANS-INDUSTRIES, INC.,

Defendants-Appellees.

BRIEF FOR DEFENDANT-APPELLANT-APPELLEE ASHTON AND DEFENDANTS-APPELLEES

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BRIEF FOR DEFENDANT-APPELLANT-APPELLEE
ASHTON AND DEFENDANTS-APPELLEES

PRELIMINARY STATEMENT

This brief is submitted in support of defendant Ashton's appeal from so much of the Court's judgment entered on April 6, 1977 as was against him and in favor of plaintiffs, and is submitted on behalf of all defendants in opposition to plaintiffs' cross-appeal from that part of the judgment which dismissed plaintiffs' first and fourth causes of action as against all defendants and dismissed the complaint in its entirety as against defendants Youngblood and Trans-Industries.*

QUESTIONS INVOLVED

1. Did the Court below err in refusing to dismiss plaintiff's pendent claims along with plaintiff's ~~general~~ FEDERAL claims where:

(a) defendants had made three motions to dismiss (two of which were granted) and a motion for summary

* The second cause of action was also dismissed by the judgment, but plaintiffs stated at the beginning of trial that they had abandoned that cause of action.

judgment prior to trial based on lack of subject matter jurisdiction;

(b) the pendent claims were added over defendants' objection four years after the action was commenced;

(c) defendants requested a separate trial on the ~~general~~ FEDERAL claims;

(d) the court dismissed the Federal claims after hearing plaintiff's own testimony and offer of proof because plaintiffs failed to establish a purchase or sale of securities?

2. Did the Court below err in holding that the New York Statute of Frauds, which requires all contracts to pay a finder's fee to be in writing, was satisfied by a contract between the parties which contained a promise by defendant not to deal with a certain company, but said nothing whatsoever about finders' services or finders' fees?

3. Did the Court err in holding that the restrictive agreement between plaintiffs and defendant Ashton was valid UNDER New York State law despite plaintiffs' lack of any economic interest which the restriction could legitimately protect?

4. Did the Court below err in holding that the appropriate measure of damages for breach of a contract, in essence, not to compete, was a reasonable finders' fee instead of the profits which plaintiffs would have made had the contract been complied with?

COUNTER STATEMENT OF QUESTIONS INVOLVED ON PLAINTIFFS' CROSS-APPEAL

Was the Court below clearly erroneous in dismissing plaintiff's first and fourth causes of action on the basis of its findings that:

(a) plaintiffs and defendants had no contract for the purchase or sale of securities;

(b) even if there had been such a contract to purchase or sell securities, there no fraud in connection with it;

(c) Youngblood did not know of any contract between plaintiffs and defendants Ashton until it was breached;

(d) Youngblood did not induce a breach of contract, but acted to protect his own legitimate economic interests, which plaintiffs had tried to restrict;

THE NATURE OF THE CASE

1. Pleadings and Prior Proceedings

(a) Development of the Pleadings

The complaint presently before the Court is the third amended complaint. The original complaint and the first amended complaint were dismissed for failure to state claims upon which relief could be granted. The third amended complaint was filed over defendants' objection more than four years after the action commenced, and nearly seven years after the events complained of.

Judge Lasker dismissed the original complaint (A6)* for failure to state a claim on December 31, 1969 in a memorandum opinion (A17).

Judge Levet dismissed the first amended complaint (A25) for failure to state a claim and for lack of subject matter jurisdiction in a memorandum opinion dated April 15, 1970 (A33).

Judge Motley denied defendants' motion to dismiss the second amended complaint (A36) on March 9, 1971 with a brief endorsement.

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* References in form (A--) are to the Appendix.

In or about March 1973, plaintiffs moved for leave to serve and file a third amended complaint. The third amended complaint retained the claims which had been alleged in the second amended complaint and, for the first time, added two alleged "pendent" causes of action. Over defendants' opposition, the motion to amend the complaint was granted (A51) and issue was joined.

(b) Allegations of the Complaint.

The first cause of action in the third amended complaint alleges that plaintiffs wanted to obtain an interest in Transign, Inc. ("Transign"), a Michigan corporation which was owned and controlled by defendant Youngblood. Plaintiffs allege that they had certain confidential information about Transign and that defendant Ashton fraudulently induced them to disclose that information to him, and to introduce him to defendant Youngblood by misrepresenting to plaintiffs: first, that he would not attempt to acquire or deal with Transign without their consent; and second, that they would receive 35% of the stock of a new corporation which was to be formed by plaintiffs and British-American Insurance Co., Ltd. ("British American"), Ashton's employer, to acquire Transign. British-American is not a defendant. Plaintiffs alleged

that, contrary to the "representations," and the "agreement," defendants Ashton and Youngblood caused defendant Trans-Industries, Inc. ("Trans-Industries") to be formed and caused it to acquire Transign without giving plaintiffs the opportunity to buy 35% of the Trans-Industries stock. The complaint then goes on to allege that the conduct just described constituted a violation of Section 10(b) of the Securities Exchange Act of 1934 and of Rule 10b-5 thereunder. The second cause of action requested an injunction to prevent defendant Ashton from disposing of his stock in Trans-Industries. The third cause of action (which is one of the claims added by the third amended complaint) alleges that defendant Ashton breached his agreement not to deal with Transign except on terms acceptable to plaintiffs. The fourth cause of action (another claim added by the third amended complaint) alleges that defendants Youngblood and Trans-Industries knew of this alleged agreement and induced Ashton to breach it.

The answer denies the material allegations of the complaint, denies that defendants were guilty of any fraud or misrepresentation and asserts ~~the~~ several affirmative defenses, including failure to state a claim, fraud, lack of personal jurisdiction, statute of frauds and illegality.

The allegations of plaintiffs' Federal claims are

so unclear that the several judges who considered them had difficulty in interpreting them. Judge Lasker, in analyzing the first complaint, concentrated on the alleged agreement by which plaintiffs would receive 35% of the stock of "a new corporation to be formed" by plaintiffs and by British-American to acquire Transign. He thought that the complaint, if "charitably" construed, alleged that:

> "But for defendants' fraud their acquisition of the stock which it was 'agreed' they would receive would have been consummated."

Judge Levet relied on Judge Lasker's interpretaion of the complaint, but seemed to think that the alleged agreement to purchase securities was in writing. He stated:

> "[Judge Lasker] appeared to suggest that the alleged written agreement signed by plaintiffs and defendant Ashton was sufficient foundation for a federal claim under Section 10(b)."
>
> * * *
>
> "There is some authority for the proposition that a contractual agreement to purchase or sell securities which is not consummated by reason of defendants' fraud is actionable under Section 10(b)." (Emphasis added.)

It was clear by trial, if not sooner, that plaintiffs had no written agreement with anyone relating to a purchase or sale of securities.

(c) Defendants' Motion for Summary Judgment.

Prior to trial, defendants moved for summary judgment dismissing the third amended complaint on the ground that this Court lacked jurisdiction over the subject matter of the action because there was no purchase or sale of securities and because plaintiffs were not purchasers or sellers of securities, as required by the Securities Exchange Act of 1934.

In moving to dismiss prior to trial, defendants were deliberately following the suggestions implied in former Chief Judge Friendly's opinion in Kavit v. A.L. Stamm & Co., 491 F. 2d 1176 (2d Cir. 1974). In that case, this Court held, "without enthusiasm," that the District Court had not abused its discretion by exercising pendent jurisdiction. In Kavit, the defendants had allowed the trial to proceed on both the federal and state law claims without objection. Defendants had not moved for summary judgment or separate trial on the federal law claims, and had not asked the Court to try the federal claims first. Because of the defendants' failure to object, the trial

Court had invested substantial judicial time in the case.

(d) Defendants' Motions for Separate Trials.

In their brief in support of the motion for summary judgment, defendants also suggested that, in any event, the Court should try the federal claims first and that the state claims should not be considered until the Court had decided that the federal claims had merit. (See Defendants' Memorandum of Law in Support of Their Motion for Judgment Dismissing the Complaint, page 29).

Again in their pre-trial memorandum (page 4), defendants suggested that the alleged pendent claims should not be entertained unless and until plaintiffs had established a valid federal claim.

The Court denied the motion to dismiss, but, on the first day of trial, vacated its decision so that it could reconsider the motion based on additional submissions (T.M. 59).*

After the Court had considered the additional submissions of the parties, it denied defendants' motion to dismiss and directed that the trial proceed. Again, in open Court (T.M. 64), defendants suggested

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* References in the form (T.M.--) are to the trial transcript.

that the testimony should be limited to the making of the alleged agreement which was necessary to support federal jurisdiction. The Court rejected the suggestion, and divided the trial only to separate liability and damages.

(e) Dismissal of the Federal Claims.

Thereafter, plaintiffs offered three days of evidence and, at the end of the third day, made an offer of proof on the first cause of action. Although the Court was reluctant to characterize plaintiffs' proof on the alleged agreement as frivolous (T.M. 596), it dismissed the federal claim solely on the basis of the plaintiffs' evidence, without any contradictory evidence having been put in by the defendants, because plaintiffs had failed, as a matter of law, to prove the existence of the kind of "agreement" contemplated by the federal statutes and rules and had failed, as a matter of law, to prove that there was any fraud in connection with that alleged agreement (T.M. 515). After the Court had made its ruling dismissing the federal claim, defendants again moved to dismiss the pendent claims, and the motion was denied (T.M. 508).

(f) Addition of Still Another Pendent Claim After Trial.

At the end of trial, plaintiffs moved to amend the pleadings to conform to the proof by adding a claim in the nature of quantum meruit for a reasonable finder's fee.

Although defendants had contended throughout the case that no finders' fee claim had been pleaded, objected to the introduction of any evidence on such a claim (T.M. 98), and opposed the motion to "conform," the Court granted the motion (A155).

2. Summary of Evidence.

While the parties undoubtedly are entitled, in an appellate brief, to summarize, comment upon and characterize the evidence presented at trial, defendants respectfully suggest that plaintiffs have abused that privilege in their brief by substituting inaccuracy, distortion and hyperbole for a fair and accurate characterization of the facts. Some of the evidence is misstated, some exaggerated and some ignored.

In this brief, defendants will try to summarize the essential facts and to correct some of the more glaring and important misstatements and inaccuracies in plaintiffs' brief.

(a) Plaintiffs' Discovery and Deception of Youngblood.

In one of the most glaring mischaracterizations found in plaintiffs' brief, they contend that the ad which the Dessers placed in The Wall Street Journal on August 9, 1965 was an offer "to assist persons in the purchase or sale of business (defendants' Exhibit' F')." (Plaintiffs' ~~Post-Trial Memorandum~~ BRIEF, page 6). Defendants' Exhibit F, however, was obviously not an offer to assist anyone in the purchase or sale of businesses. On its face, it is an offer to enter into negotiations, apparently placed by or on behalf of a potential purchaser, an unnamed "tax exempt foundation." The ad itself is short enough to repeat verbatim:

> "TAX EXEMPT FOUNDATION
>
> Will purchase private and closely held companies with pretax earnings of $200,000 and up. All negotiations conducted on a strictly confidential basis. Quick action assured. This is our first and only advertisement.
>
> Box D-881, The Wall Street Journal"

The ad was the basis for Youngblood s contact with the Dessers, and it was on the terms set out in the ad that the relationship between plaintiffs and Youngblood was formed.

Given the text of the ad, it was not necessary for Youngblood to mention the subject of confidentiality at all, but he did so on many occasions (Youngblood, T.M. 779). Youngblood's first letter to the Dessers (plaintiffs' Exhibit "3") contrary to the implication conveyed in plaintiffs' brief, did not mention Transign's name or location or reveal the nature of its business, and gave only Youngblood's home address. Youngblood cautioned Desser immediately on meeting him about the sensitivity of the information which he was about to disclose (Youngblood, T.M.779), and the Dessers assured him that they were representatives of the Catholic Church, and, of course, "could be trusted" (Youngblood, T.M. 779; 806, 807).*

It is undisputed that the Dessers did not have any agreement with Mr. Youngblood for the purchase of his company (and the Court so found, A122), and had not agreed upon a definite purchase price. In addition, they had not been given any exclusive agency by Mr. Youngblood to find a purchaser for his company (T.M. 427) nor any authority to deal with anyone on behalf of Transign or to divulge any information which Youngblood gave them about his company to anyone (Youngblood, T.M. 805), and the Court so found (A 121).

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* As we will show below, the trial court found these to be the facts, and on this and many other subjects, the Court did not believe the well rehearsed testimony of the plaintiffs.

Nevertheless, the Dessers immediately began seeking a purchaser for Transign or, in the alternative, financing which would enable them to purchase the company themselves. It is undisputed that Melvin Desser approached several potential sources of finance and disclosed the name and financial information about the company without obtaining any oral or written agreement to keep the information confidential (Melvin Desser, T.M. 376; 390; 455; Leonard Desser, T.M.217)

One of the people whom the Dessers approached in an effort to find financing for their acquisition of Transign was plaintiff Jacob S. Landesman, (Landesman, T.M. 66). It is significant that the Dessers, although they recovered a "finders fee" from Ashton, had hired Landesman as their own finder, and they agreed to pay him $20,000 if he could obtain financing for them.

Landesman conveyed certain financial information about the company to Theodore Donson and Thomas Davidson (Landesman, T.M. 67). Donson, too, expected to obtain a finders' fee from the transaction for introducing Ashton's employer, British American and the Dessers (Landesman, T.M. 132-133).

(b) The June 20, 1966 Meeting.

In any event, a meeting was set up through Davidson and Donson for June 20, 1966 at which Ashton met the Dessers and Landesman for the first time. Prior to and during the course of this meeting, the Dessers and Landesman advised Ashton, Davidson and Donson that they had negotiated a deal to purchase a company for $2 million (Landesman, T.M. 129, 132, 135, 153; Leonard Desser, T.M. 252), that they had "full authorization to act on behalf of Transign," that "they were spokesmen for the company," and that they had a "veto power on any kind of a deal" (Davidson, T.M. 843-844).

It is clear from the Dessers' own admissions and from the testimony of Mr. Youngblood that such representations were false, that the Dessers had no deal with Transign, had no authority to act on behalf of Transign and had no veto power over any activities of Transign (See, e.g., Ptf.s' Exhibits 4, 5; Youngblood T.M. 789-790).

In reliance on these representations, however, Ashton signed plaintiffs' Exhibit 1. The letter provides that Ashton will not disclose any confidential information given to him about Transign by the Dessers

and that he will not attempt to deal with or acquire the company except on terms acceptable to the Dessers. It says nothing at all about a finder's fee.

After the letter was signed, the Dessers and Ashton had further discussions about Transign, about the kind of transaction which British American might be willing to finance and about the terms of such a financing. The Court found, on the basis of plaintiffs' own testimony, that no agreement as to these terms was reached on June 20, 1966, or at any other time (A 127).

(c) Ashton's Introduction to Youngblood.

Although plaintiffs tried to establish that, at the June 20, 1966 meeting, or immediately thereafter, Ashton formed the intention of circumventing the Dessers (and British American as well) so that he could purchase Transign for his own account, there is not a shred of evidence in the record to suggest that, during the month or more between the June 20, 1966 meeting and the late July 1966 meeting in Michigan, Ashton made any attempt to contact Transign or Youngblood or to deal with Transign or Youngblood in any way except on the terms that had been discussed with the plaintiffs on June 20, 1966.

In late July 1966, the Dessers arranged for

Ashton to visit Transign and Youngblood, telling Youngblood that they wanted to bring their "figure man" for additional information in depth about the company (Youngblood, T.M. 782). When Youngblood arrived at the meeting, Melvin Desser stepped outside (i.e. out of Ashton's hearing) and told Youngblood that the "figure man" would ask for details, but Youngblood was not to worry because Melvin Desser "was still the boss" (Youngblood, T.M. 783). Youngblood was then taken inside to meet Ashton.

Plaintiffs contend that there is something "incredible" about the fact that, during their meetings with the Dessers in Michigan, Youngblood did not ask Ashton and Courtney whom they worked for and where they came from; and that Ashton never told Youngblood during these meetings whom he worked for and where he came from. (Plaintiffs' brief, page 14).

All of these events, however, are entirely consistent with the fact that the Dessers, as middlemen, had told different stories to all sides and had succeeded in deceiving both Ashton and Youngblood. Thus, because Youngblood believed that Ashton and Courtney were part of the Dessers' organization (Youngblood, T.M. 825), he had no reason whatsoever to ask them for their credentials.

Similarly, because the Dessers had arranged the meeting with Youngblood, (Ashton, T.M. 545), Ashton assumed that Youngblood knew who he was and, again, had no reason whatsoever to present his credentials to Youngblood, and the Court so found (A129).

It is equally credible that, once he and Youngblood had discovered the truth about the Dessers, Ashton did not mention the June 20, 1966 letter to Youngblood. That letter, too, was just was much part of the deception as the Dessers' statement to Youngblood that Ashton as their "figure man."

What is incredible, however, is Melvin Desser's well-rehearsed, detailed and embellished description of how he informed Youngblood time and time again of the existence of the June 20, 1966 letter (Melvin Desser, T.M. 421-422), at a time when it was clearly not in the Dessers' interest to let Youngblood know that they had disregarded his instructions and discussed his company with third persons, and the Court so found (A160).

Youngblood testified that when a disagreement apparently arose among Leonard Desser, Ashton and Courtney, Melvin Desser continued to tell him not to worry and offered him a $50,000 check, which Youngblood (Youngblood, T.M. 785)

refused. Melvin Desser's version is that Youngblood stated that he would sign a contract with the Dessers to the exclusion of British American (Melvin Desser, T.M. 415-416). A single conclusion can be drawn from both versions, however: that the Dessers and Youngblood had no deal. Youngblood was not willing to accept any money or give any option absent a detailed agreement (Youngblood, T.M. 784-785), and Melvin Desser was not prepared to sign an agreement because, among other reasons, he did not have the financing to purchase Transign (Melvin Desser, T.M. 492).

After the meeting in Detroit broke up, Ashton telephoned Youngblood and Youngblood learned for the first time that Ashton was not the Dessers' "figure man" but represented British American, an independent third party (Youngblood, T.M. 730, 733, 734 and 785). He also learned for the first time that the Dessers had represented themselves as principals of Transign (Youngblood, T.M. 789), and as having a deal that only they could negotiate (Youngblood, T.M. 791).

Youngblood told Ashton that the Dessers had no control over his company, and that he, Youngblood, could deal with anyone he wanted to and that, if Ashton wanted to pursue the transaction on behalf of British

American without the Dessers, Youngblood would be happy to consider negotiating with them (Youngblood, T.M. 726-728, 735). The Court found that Youngblood did not know of the existence of Exhibit 1 at this time (A160).

(d) The British American Negotiations With Transign.

Leonard Desser telephoned Youngblood within the next several days and Youngblood told him that he resented the Dessers' misrepresentations and wanted nothing more to do with them (Youngblood, T.M. 736).

Leonard Desser also telephoned Ashton and Ashton informed him that British American could not consider a purchase of Transign with the Dessers as partners (Ashton, T.M. 572 and 642), and that the only possibility would be with the Dessers taking a finders' fee (Ashton, T.M. 642). Leonard Desser said that this was unacceptable and hung up (Ashton, T.M. 572 and 642).

In their brief, plaintiffs suggest that Ashton began to negotiate directly with Youngblood to the exclusion of the Dessers immediately after leaving Michigan, and even before Leonard Desser had expressed a willingness to accept a $100,000 finders' fee.

The dates of the documents which plaintiffs themselves produced, however, show that the suggestion is baseless. After leaving his meeting with Youngblood in Michigan in late June 1966, Ashton did not approach Youngblood or negotiate with Youngblood until after Leonard Desser had expressed a willingness to accept a finders' fee (Ashton, T.M. 643).

Plaintiffs argue that the finders' fee agreement with British American was not signed until August 31, 1966 and that Ashton was negotiating with Transign prior to August 15, 1966. The facts are entirely consistent, however, because it is clear from plaintiffs' Exhibit "11", a letter dated August 15, 1966 from Ashton to Lee, that the agreement to pay the Dessers a finders' fee had been reached prior to that date. Thus, there is no evidence whatsoever to show that Ashton negotiated with Youngblood before Leonard Desser had agreed to take a finders' fee.

Ashton made every effort to have the Transign deal consummated, and this was entirely in accordance with the terms of the June 20, 1966 agreement, because the British American acquisition of Transign had plaintiffs' full approval. Ashton had discussions and negotiations with Youngblood and caused Mr. Lee and other members of

the British American Board of Directors to visit Youngblood in Michigan (Ashton, T.M. 693 and 694). In addition, Ashton prepared a report to the Board of Directors of British American and, as a result, on September 14, 1966, the Board of Directors authorized Mr. Lee, British American's president, to proceed with the negotiations.

(e) The British American Deal Would Not Give Youngblood a "Higher Price".

Plaintiffs argue that British American and Ashton had caused Youngblood to reject plaintiffs as potential purchasers by offering him a much higher purchase price -- $2.5 to $2.9 million (Ashton, T.M. 591), as opposed to the $2 million discussed by plaintiffs -- but there was an obvious reason for the different prices. Between the time that Youngblood met the Dessers in 1965 and the time that British American began to negotiate with Youngblood, Transign had accumulated more than $500,000 in cash, developed a new product, and doubled the company's profits. All of this cash and all of these new assets were now to be part of the transaction (Youngblood, T.M. 804; Ashton, T.M. 649-653). While the Dessers intended to purchase only assets, not including cash (Melvin Desser, T.M. 473,

477-478, 486-487), the proposed purchase by British American would have been a stock purchase including all cash and other assets (Ashton, T.M. 649-653).

This difference between the two deals is clearly sufficient to account for the different purchase prices, and the Court so found (A149-A150).

(f) Plaintiffs' Continuing Inability To Finance a Purchase of Transign.

Meanwhile, after the meetings in Detroit, and after learning that British American would not deal with them, the Dessers began to make other efforts to find financing so that they could purchase Transign (Leonard Desser, T.M. 284 and 344). It is conceded that, at this point, they discussed Transign with a number of companies and disclosed the name of Transign without obtaining any agreement of confidentiality (Leonard Desser, T.M. 369-370). Moreover, it is also conceded that the plaintiffs were never able to find financing.

(g) Breakdown of the British American Deal.

In late September 1966, the proposed transaction between British American and Transign broke down (Ashton, T.M. 657-658). There is no

evidence to suggest that Ashton caused the deal to break down because of any desire on his part to purchase Transign for his own account, or for any other reason (Ashton, T.M. 657-658; Youngblood, T.M. 795). Shortly thereafter, in October 1966, British American advised Ashton to seek other employment and, having been told by Youngblood that he needed a financial adviser, Ashton asked for the position and Youngblood hired him (Ashton, T.M. 660).

(h) Plaintiffs' Distortion of the Time Sequences.

In their brief, plaintiffs state that, in October 1966, all of the following events happened concurrently: Ashton advised Coenen that the British American acquisition had broken down and Transign was available; Ashton was fired by British American; Ashton was hired by Youngblood to find a purchaser; Ashton and Coenen attempted to arrange the acquisition of Transign by Keene.

In fact, however, the sequence was not as plaintiffs have alleged. Ashton's early conversations with Mr. Coenen about Transign were based on his long standing relationship with Coenen and on British American's relationship to Laird & Co. as one of its invest-

ment counselors (Ashton, T.M. 666, 676 and 677). The conversations were in furtherance of the British American acquisition of Transign, not in derogation of it.

After Ashton's employment with British American was terminated in October 1966, and Ashton was hired by Youngblood, the first potential purchaser of Transign which Ashton found was not Keene Corporation but a group composed of Warburg, Shearson, Hammill, and Laird (Youngblood, T.M. 800; Ashton, T.M. 667). This group negotiated directly with Transign and then negotiations stopped.

A hiatus of about one month intervened and then the same group returned with a proposal to purchase Transign using Keene as a vehicle to make the acquisition (Youngblood, T.M. 801). Plaintiffs imply that Ashton and Youngblood had the Keene deal planned from the beginning, but the facts simply do not bear out plaintiffs' conspiratorial theory. Plaintiffs try to draw the same conclusion from the fact that Coenen met with Glen Bailey for dinner in September 1966. In fact, Mr. Coenen did not talk to Bailey about Keene in September 1966. During that time, Bailey was simply looking for a new position and Coenen was talking to him about that (Coenen, T.M. 758).

As we have already demonstrated, the price was higher only because more assets were included (Ashton, T.M. 651 and 656) and, in all but one of the deals Ashton brought to Youngblood, he had no interest whatsoever (Ashton, T.M. 671).

(i) Youngblood's Right to Sell His Own Company Without Waiting For the Dessers.

The Dessers had no exclusive deal with Transign; in fact, they had no interest whatsoever in Transign. Youngblood had no obligation to sell to them or to allow them to bring any buyers to Transign. Although the Dessers knew about Transign in August 1965 (Plt.s' Exh. "3"), they did nothing about a possible acquisition of Transign until Spring of 1966. It was not until September 1966 that the British American deal broke down, and, during that entire period, the Dessers had not been able to find financing for a purchase of Transign (Melvin Desser, T.M. 492; Leonard Desser, T.M. 344). Youngblood was not required to wait any longer for the Dessers, and, in view of their misrepresentations about their relationship with his company, he was entitled to terminate all contacts with them, which he properly did (Youngblood, T.M. 736).

The plaintiffs' theory is that Ashton and Youngblood conspired to eliminate the Dessers, and their distortion of the time sequences is calculated to prove that theory. The actual facts, however, show that, by their inability to obtain financing and their misrepresentations, the Dessers eliminated themselves.

(j) Trans-Industries' Acquisition of Transign.

Finally, in September 1967, well over a year after the Dessers initially contacted Ashton, Ashton, Coenen and Miller formed Trans-Industries and Trans-Industries purchased Transign. Although Trans-Industries paid Youngblood a combination of cash and notes amounting to more than $3 million for the stock of Transign and a patent held by Youngblood, one of the notes was not actually paid in cash (Youngblood, T.M. 750). Moreover, plaintiffs' description of the benefits Ashton received from the deal is simply contrary to the record. There is no basis whatsoever for plaintiffs' allegation (Plaintiffs' Brief, page 27) that Ashton received 450,000 shares of stock worth $5.25 per share. Indeed, plaintiffs do not even pretend to support this statement with a reference to the record.

Plaintiffs had every opportunity to call an expert on the question of value, but they did not do so. Indeed, the only testimony with respect to the value of Ashton's Trans-Industries securities came in response to a question put to defendants' expert, Mr. Goldman, by the Court. Mr. Goldman testified quite clearly that the stock was certainly not worth more than the $330,000 which Ashton paid, and could have been worth considerably less (Transcript of proceedings held on December 7, 1976, page 41). If plaintiffs claim that Ashton was unjustly enriched by the opportunity to participate in the Trans-Industries acquisition, they have failed to prove the amount of such unjust enrichment, and all of the evidence which was introduced shows, to the contrary, that Ashton's opportunity to participate in that deal was not worth any more than he paid for it. Indeed, the ultimate result of his participation was a net loss to him (Defendant Ashton's Exhibit AA).

THE OPINIONS OF THE COURT

The District Court wrote three opinions in connection with the trial of the case. The first, dated November 7, 1975, held that an oral contract to purchase or sell securities could be sufficient to sup-

port an anti-fraud action under the federal securities laws, and that there was a genuine issue of fact for trial as to whether a binding oral contract had been made.

The second opinion, dated June 29, 1976, was issued after the close of the trial on the issue of liability. In it, the Court made extensive findings of fact and conclusions of law. The Court consistently accepted defendants' version of the facts and disbelieved plaintiffs' testimony.

Among other things, the Court found, in its opinion, that the plaintiffs had promised defendant Youngblood that they would keep information about his company confidential (A121); that no deal or agreement had ever been reached between plaintiffs and Youngblood with respect to the sale of his company (A122); that the plaintiffs, in revealing information about Transign to Ashton, exaggerated their own position and breached Youngblood's confidence (A126); that in the June 20, 1966 meeting between the Dessers and Ashton, the parties did not reach any agreement on the terms of any contract to purchase or sell securities (A127); that, even if such an agreement had been reached, Ashton did not defraud plaintiffs (A161); that the Dessers misled Youngblood with respect to Ashton's role in the trans-

action (A127); that, after the meeting between Ashton and Youngblood in Michigan, Youngblood did not know of the existence of plaintiffs' Exhibit 1 (A131); that, thereafter, Youngblood told the Dessers that he wanted nothing more to do with them (A131) and had a right to exclude the Dessers from any purchase of Transign (A147); that the Dessers did not lose any opportunity to participate in a purchase of Transign (A148-152); that Youngblood did nothing to induce Ashton to breach his contract with the plaintiffs, and that, even if he had, he would have been privileged to do so, given the Dessers' failure to find financing or a purchaser for his company and given Youngblood's need, for medical and other reasons, to sell his company (A148-A149).

The District Court dismissed plaintiffs' first cause of action as to all defendants and dismissed plaintiffs' third and fourth causes of action as against defendants Youngblood and Trans-Industries. The Court held, however, that defendant Ashton would be liable to plaintiffs for breach of contract, as alleged in the third cause of action. The third cause of action alleged, simply, that Ashton had breached the June 20, 1966 agreement (Ptf.s' Exhibit "1"). Although that contract was purely negative in character and did not

contemplate that plaintiffs would perform any services for Ashton or receive any fee from him (A156), the Court decided that the measure of damages would be a reasonable finder's fee and not the profits which plaintiffs lost by reason of the breach (A157-A158).

In addition, the Court granted plaintiffs' motion to amend their pleadings so as to add a claim in quantum meruit for a reasonable finder's fee (A154).

After the close of the trial on damages, the Court rendered an opinion dated March 3, 1977 (A162). In that opinion, the Court dealt, for the first time, with defendants' contention that a claim for a finder's fee, under New York Law, must be in writing. Although Exhibit 1 does not say anything about a finder's fee, the Court held that it, taken together with Exhibit 6 (the August 31, 1966 finder's fee agreement between Plaintiffs and British American) could form an adequate memorandum sufficient to satisfy the Statute of Frauds (A167-A168). The Court also held that a reasonable finder's fee, under the circumstances, would be $100,000, because that was the amount agreed upon between plaintiffs and British American in Exhibit 6 (A170).

While defendants do not quarrel with most of the Court's findings of fact, we believe that the Court, because of its insistence on retaining jurisdiction over the pendent claims after dismissing the federal claims, committed several serious errors of state law.

ARGUMENT

POINT I

THE COURT ERRED IN REFUSING TO DISMISS THE ACTION FOR LACK OF JURISDICTION

A. The Complaint Did Not State A Federal Claim.

There can be no dispute that plaintiffs did not purchase or sell any securities of Transign, Trans-Industries or any other company. The complaint says only that they were deprived of an opportunity to purchase 35% of a corporation to be formed by plaintiffs and British American to purchase Transign. It has never been suggested by anyone that the parties ever entered into a written contract embodying those terms or any other terms for the purchase or sale of securities.

There can no longer be any question that the rule first adopted in this Circuit in Birnbaum v. Newport Steel Corp., 193 F. 2d 461 (2d Cir. 1952), cert. denied 343 U.S. 956 (1952) is the law.

Although the Birnbaum rule had been questioned in other circuits, Eason v. General Motors Acceptance

Corp., 490 F. 2d 654 (7th Cir. 1973), cert. denied 416 U.S. 960 (1974), and while some Courts have attempted to create exceptions from the Birnbaum rule, the United States Supreme Court put an end to any doubts about the validity of the rule in 1975 when it handed down its opinion in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

Of course a purchase or sale within the meaning of the Securities Exchange Act includes a "contract" to purchase or sell, but such a contract must be a binding, enforceable agreement and must be in writing.

The Supreme Court has stated that "ordinary rules of statutory construction still apply" to the various sections of the securities laws. S.E.C. v. National Securities Inc., 393 U.S. 453, 466 (1968). It is well settled that the words of a statute should be given their ordinary, accepted meaning. Jones v. Liberty Glass Co., 332 U.S. 524, 531 (1947). As the Supreme Court stated in U.S. v. Stewart, 311 U.S. 60, 63, rehearing denied, 311 U.S. 729 (1940), "Congress will be presumed to have used a word in its usual and well-settled sense." 1 Williston on Contracts § 1 at 1 (3d ed. Jaeger 1957), defines a contract as:

> "a promise, or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." (Footnote omitted.)

The legislative history of the statute confirms this interpretation. As the Supreme Court pointed out in the Blue Chip Stamps case, supra, the Securities and Exchange Commission tried twice to persuade Congress to amend the Act so that Section 10(b) would apply to any purchase or sale or "attempt to purchase or sell" securities. The Commission was not successful.

While the Supreme Court in the Blue Chip Stamps case, supra, did not specifically address the question of whether a 1934 Act "contract" must comply with the Statute of Frauds, the Court's opinion is replete with references to the unreliability of parol testimony and to the speculative nature of the claims which would be imposed on the federal courts if Rule 10b-5 were extended to cover non-binding attempts to purchase securities, preliminary negotiations not culminating in a contract, and undocumented "aborted purchases" of securities.

The Blue Chip Stamps case did not make new law. Other cases, including some decided in this Circuit, have dismissed alleged claims under Rule 10b-5 when the "contracts" on which they were based were, by their terms or as established by proof, not binding or enforceable. In The Duplan

Corp. v. Iroquois Industries, Inc. [1967-1969 Transfer Binder] CCH Fed. Sec. Rep. ¶92,318 (W.D.N.Y. 1968), the Court dismissed the complaint of a potential merger partner under Section 10(b) on the ground that the plaintiff was not a purchaser or seller of securities. The Court found that the plaintiff and its prospective merger partner had entered into a written agreement in principle to merge, but that the agreement in principle was not binding.* In Ashton v. Thornley Realty Co., 346 F. Supp. 1294 (S.D.N.Y. 1972), the plaintiff entered into a written agreement with the owner of shares in a cooperative apartment building to purchase the shares for a stated price. The contract provided, however, that it would be void if the plaintiff purchaser failed to secure the consent of the board of the apartment corporation. The Court held explicitly that this agreement was not a "contract" within the meaning of the Securities Act.

In the present case, although plaintiffs testified that British American board approval would be given as a matter of course, they acknowledged that it would be necessary (Leonard Desser, T.M. 364).

* Plaintiffs contend at page 31 of their brief that Ashton admitted that an agreement had been reached. In fact, while Ashton said there was an "agreement in principle" on the proportions of 65/35, there were many other essential terms which had not been agreed upon, and the Court found as a fact that there was no contract.

In Pepsico, Inc. v. W.R. Grace & Co., 307 F. Supp. 713 (S.D.N.Y. 1969), cited by the District Court in its opinion dated November 7, 1975 (A92; 408 F. Supp. at 1176), the Court granted summary judgment dismissing a complaint based on an alleged oral contract between the parties. The Court found that there was no binding contract between the parties, although they had entered into an "agreement in principle" which was subject to the negotiation of a formal purchase agreement.

In Ingenito v. Bermec Corp., 376 F. Supp. 1154, 1180-81 (S.D.N.Y. 1974), the Court analyzed a number of relevant decisions and concluded that:

> "A purchase or sale arises when the nature and terms of an investor's involvement in a business enterprise are substantially altered by the creation of new rights or obligations." (Emphasis added.)

Clearly, only a binding or enforceable contract can create new rights or obligations.

While the foregoing cases do not specifically discuss the Statute of Frauds, they illustrate the rule that the parties must reach agreement on all essential terms of a contract before it can serve as the basis for a suit under Rule 10b-5.

The only case which defendants have been able to find in which the Court refers to the question of whether a contract must comply with the Statute of Frauds in order to serve as the basis for a claim under Rule 10b-5 did not decide the question. Dopp v. Franklin National Bank, 461 F. 2d 873 (2d Cir. 1972). The Court, however, did note that the failure to comply with the Statute of Frauds made it difficult to believe that an agreement to purchase or sell securities existed. While defendants have found no cases which specifically applied the Statute of Frauds to a contract under Rule 10b-5, they have likewise found no cases in which a plaintiff has been allowed to recover under Rule 10b-5 on the basis of an oral agreement to purchase securities.*

And, although the Supreme Court did not specifically refer to the Statute of Frauds in its opinion in the Blue Chip Stamps case, the policy considerations which led it to dismiss the complaint of the "abortive purchaser" are the same considerations which underlie

* Cases predicated on oral instructions from a customer to a broker are not applicable because they involve a principal-agent relationship which renders the oral contract enforceable. 3 Anderson, Uniform Commercial Code, § 8-319; 5 at 789 (2d ed. 1971); U.C.C. § 8-319 (c) and Official Comment.

the Statute of Frauds itself: the unreliability of parol proof of the terms of complicated agreements; the difficulty of ascertaining damages in a case where there has been no documentary evidence of such terms as price and quantity; and the speculative nature of the claims which would be brought if a plaintiff with no documentary proof could recover merely by alleging that he would have purchased had it not been for a defendant's conduct. Thus, defendants contend that the Statute of Frauds must be applied.

If the Statute is applied, it is clear that it has not been complied with. The Statute (U.C.C. § 8-319) requires the memorandum to show that a contract has been made "for the sale of a stated quantity of described securities at a described or stated price." (Emphasis added). While some terms of an agreement may be shown by parol, the quantity of described securities and a defined or stated price must be in writing. 3 Anderson, Id., § 8-319:10 at 793.

Since the complaint did not allege that the plaintiffs and defendant had entered into a written agreement to purchase or sell a described or stated quantity of securities at a defined or stated price, the complaint should have been dismissed prior to trial.

B. As A Matter Of Law, There Was No Agreement To Purchase Or Sell Securities.

Even if an oral contract could support a claim under the securities laws, it was clear from the papers submitted in support of defendants' motion for summary judgment that, as a matter of law, there was no contract, oral or written, in this case.

In their pre-trial depositions, the plaintiffs themselves characterized the June 20, 1966 discussions as "proposals," and acknowledged that the proposals would have to be reviewed by Ashton's superiors at British American. Other documentary evidence submitted on the motion made it clear that the parties themselves intended to enter into a formal written agreement which would contain all of the terms of the deal (A82-A84; Affidavit of Martin I. Shelton, sworn to November 6, 1972, pp. 3 and 4).

Despite these incontrovertible facts, the District Court denied defendants' motion for summary judgment (A88; A90). In addition, the Court refused to limit the trial to those issues of fact which the motion for summary judgment disclosed were critical to a determination of the Court's jurisdiction. Thus,

the Court denied defendants' motion to limit the testimony to the issues of whether a binding contract had been made (A96). An examination of the trial transcript reveals that only 130 pages of the testimony (including direct and cross examination) were devoted to the meeting at which the contract was allegedly made. It would have been extremely simple for the Court to limit testimony to that meeting. Indeed, such testimony could have been taken in one day.

Instead, the Court allowed testimony on all of the issues to be presented and then dismissed plaintiffs' federal claims after hearing three days of testimony and after plaintiffs had been given a further opportunity to make an offer of proof (A508).

At that point, the Court refused to dismiss the pendent claims and allowed the trial to proceed.

C. In Any Event, The Pendent Claims Should Have Been Dismissed When The Federal Claims Were Dismissed.

Until 1966, the leading Supreme Court case on pendent jurisdiction was Hurn v. Oursler, 289 U.S. 238 (1933), which had permitted the exercise of pendent jurisiction only where the "pendent" claim was, in es-

sence, the same "cause of action" as the federal claim. In United Mine Workers v. Gibbs, 383 U.S. 715 (1966), the Supreme Court declined to follow the "unnecessarily grudging" approach of Hurn v. Oursler, supra, and the Court redefined, and, to some extent, liberalized the requirements for exercising pendent jurisdiction. Nevertheless, the Court was careful to point out that the power to exerise pendent jurisdiction is discretionary and should be exercised only where the federal claim has "substance" and should not be exercised where the federal claim is merely an "appendage" to a state law case. The Court stated (pp. 726-727):

> "Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well ....
>
> "The question of power will ordinarily be resolved on the pleadings. But the issue whether pendent jurisdiction has been properly assumed is one which remains open throughout the litigation. Pretrial procedures or even the trial itself may reveal a substantial hegemony of state law claims, or likelihood of jury confusion, which could not have been anticipated at the pleading stage. Although it will of course be appropriate to take account in this circumstance of the already completed course of the litigation, dismissal of the state claim might even then be merited. For example, it may appear that

> the plaintiff was well aware of the nature of his proofs and the relative importance of his claims; recognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case. Once it appears that a state claim constitutes the real body of a cause, to which the federal claim is only an appendage, the state claim may fairly be dismissed." (Footnotes omitted, emphasis supplied).

The principles laid down by the Supreme Court in Gibbs have been followd in a number of cases decided in this Circuit. E.g., Abrams v. Carrier Corp., 434 F. 2d 1234 (2d Cir. 1970); Iroquois Industries, Inc. v. Syracuse China Corp., 417 F. 2d 963 (2d Cir. 1969), cert. denied 399 U.S. 909 (1970); Yanity v. Benware, 376 F. 2d 197 (2d Cir. 1967), cert. denied 389 U.S. 874 (1967).

More recently, these principles were reaffirmed in the Second Circuit cases of Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F. 2d 1292 (2d Cir. 1971), cert. denied 406 U.S. 930 (1972); Bache & Co., Inc. v. Roland, 375 F. Supp. 989 (S.D.N.Y. 1974); and Kavit v. A.L. Stamm & Co., 491 F. 2d 1176 (2d Cir. 1974).

In Kavit, supra, the direct question presented was whether Judge Bonsal's decision to allow a trial on the pendent claims and federal claims to proceed (even though judgment was ultimately granted only on the state law claims) was an abuse of discretion. This Court held "without enthusiasm," (at 1184), that "on the special facts here presented, the District Court did not abuse its discretion by exercising pendent jurisdiction," id. Among the "special facts presented" was the fact that the defendants had allowed trial on both state and federal law claims to proceed without moving for a separate trial or summary judgment on the federal law claims, or, at least, asking the Court to try the federal claims first.

As the Supreme Court stated in Gibbs, supra, the issue of whether pendent jurisdiction has been properly assumed "remains open throughout the litigation," 383 U.S. at 727, and state law claims may properly be dismissed even after trial where, throughout the case, "the plaintiff was well aware of the nature of his proofs and the relative importance of his claims." Id. In the present case, defendants moved to dismiss the complaint three times for failure to state a federal claim. Twice they were successful. Once defen-

dants moved for summary judgment, and on several occasions they moved for a separate trial of the federal claims.

In the present case, there were no special circumstances justifying the Court's decision to retain the pendent claims. Neither plaintiffs' self-imposed hardship nor the Court's error in refusing to dismiss the case before trial can justify the Court's decision to retain the pendent claims. In holding that the pendent claims should not be dismissed because they were not brought in bad faith (A137), the Court was in error. As the Court of Appeals for the Third Circuit stated when confronted with a similar situation, in Tully v. Mott Supermarkets, Inc., 540 F. 2d 187, 196 (3d Cir. 1976):

> "Nor can the court's exercise of jurisdiction be justified on the ground that 'exceptional circumstances' were present which removed the case from an application of the general rule requiring dismissal. Notwithstanding the already substantial time devoted to the case and the expense incurred by the parties, we do not believe that the hallmark considerations of 'judicial economy, convenience, and fairness to litigants' dictate that the pendent claims be entertained. It is indeed unfortunate that the case has progressed to the appel-

> late level following a trial by the district court when it should have been dismissed on the pleadings for lack of standing. The fault, however, cannot be attributed to any lack of diligence on the part of the defendants who at all times during the proceedings have vigorously asserted their standing objections. Were we to sustain the district court's exercise of pendent jurisdiction merely because of the time already invested in litigating the state claims, we would be insulating from review a significant class of cases solely because an alleged error had been perpetuated through the trial process. The needless expenditure of time and energy occasioned in the first instance by the improper exercise of pendent jurisdiction would thus become the justification for allowing the incorrect ruling to stand. 540 F. 2d at 196. (Emphasis added.)

Under all of the circumstances, we submit that the Court abused its discretion in deciding the state law claims.

POINT II

THE NEW YORK STATUTE OF FRAUDS BARS RECOVERY OF ANY FINDER'S FEE

The New York Statute of Frauds, contained in General Obligations Law § 5-701(10), is explicit in prohibiting enforcement of oral or implied finder's fee contracts. It provides:

> "§5-701. AGREEMENTS REQUIRED TO BE IN WRITING Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
>
> * * *
>
> "10. Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. 'Negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the

> transaction. This provision shall apply to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman. As amended L. 1964, c. 561, eff. Sept. 27, 1964."

The New York Courts have repeatedly held that the Statute may not be circumvented by a recovery in quantum meruit, see, e.g., Minichiello v. Royal Business Funds Corp., 18 N.Y. 2d 521 (1966); Klein v. Smigel, 44 A.D. 2d 248 (1st Dept. 1974); Roberts v. Champion International, Inc., 382 N.Y.S. 2d 790 (A.D. 1st Dept. 1976); and there can thus be no doubt that plaintiffs' claim in quantum meruit (added by the post-trial amendment of the pleadings) is barred in its entirety by the Statute of Frauds. The only remaining question which needs to be discussed is whether the June 20, 1966 Agreement (Ptf.s' Exhibit 1), together with the August 31, 1966 Agreement (Ptf.s' Exhibit 6), is a sufficient memorandum of a finder's fee agreement to satisfy the Statute of Frauds. It is clear from the Agreements themselves and from the cases interpreting the Statute that it is not.

The June 20, 1966 Agreement itself says nothing

about the performance of finder's services, does not say who is to be acting as finder or for whom and does not prescribe any fee. To transform that Agreement into a finder's fee agreement would be a violation of the spirit of the Statute of Frauds as well as of the parol evidence rule.

In Intercontinental Planning Ltd. v. Daystrom, Inc., 24 N.Y. 2d 372 (1969), the plaintiff sought to recover a finder's fee of nearly $3 million for its alleged services. The plaintiff claimed that it had a written agreement with Daystrom providing for the payment of a broker's fee upon Daystrom's acquisition of a French electronics firm. That acquisition did not take place, and the French firm was acquired by the defendant Schlumberger. Thereafter, Daystrom and Schlumberger merged. The plaintiff contended that Daystrom's president had orally agreed to extend the terms of the written agreement to provide for a finder's fee based on the merger between Schlumberger and Daystrom.

The New York Court of Appeals held that the alleged oral modification was not sufficient to satisfy the Statute of Frauds and that the written agreement, which clearly applied to a prior, incompleted acquisi-

tion, could not be extended by parol to justify a finder's fee based on a subsequent deal.

In Roberts v. Champion International Inc., 52 A.D. 2d 773, 382 N.Y.S. 2d 790 (1st Dept. 1976), the Court dismissed the plaintiff's complaint for a $1,270,000 finder's fee. In January 1970, the defendant Champion and plaintiff had entered into a written agreement providing that if, as a result of the plaintiff's efforts, Champion entered into a joint venture with the Anaconda Company before the end of 1970, it would pay the plaintiff a fee of $50,000. In May 1972, Champion purchased the assets of Anaconda's forest products division, without the further aid or knowledge of the plaintiff. The plaintiff contended that Champion had agreed orally to waive all of the restrictive conditions set forth in the letter agreement and sought recovery based on Champion's oral promise and quantum meruit. The Court rejected both arguments stating (52 A.D. 2d at 774; 382 N.Y.S. 2d at 791):

> "The sole writing herein does not support any recovery in excess of $50,000. And whether or not the plaintiff may have a viable cause based on the aforesaid letter of January 21, 1970, is not before us. Plaintiff cannot rest upon a writing which sets forth terms and conditions different from that

> which she alleges in her complaint. Poel v. Brunswick-Balke-Collender Co., 216 N.Y. 310, 110 N.E. 619. Nor, as above noted, may plaintiff circumvent the statutory requirements of a writing by pleading a cause sounding in quantum meruit."

The June 20, 1966 Agreement does not resemble a finder's fee agreement in any way, and it cannot, by any stretch of the imagination, be transformed into one.

The Court's reliance on the August 31, 1966 Agreement (Ptf.s' Exhibit 6) is equally misplaced. In that Agreement, British American (not Ashton) agreed to pay plaintiffs a finder's fee only if British American acquired Transign. The Court recognized that Ashton was not personally bound by that Agreement (A168). Moreover, the Agreement specifically provides:

> "5. In the event the Acquisition is not consummated this Agreement is null and void." (A111)

The written memorandum in Flammia v. Mite Corporation, 401 F. Supp. 1121 (E.D.N.Y. 1975) was considerably different from the combination of documents relied on by the Court here. In Flammia, the memoranda acknowledged that plaintiff had acted as a finder in connection with the very transaction which was the sub-

ject of the lawsuit. The August 31, 1966 Agreement related to an earlier unconsummated acquisition, was void by its terms and, in any event, was not signed by the party to be charged.

Thus, the Statute of Frauds prohibits the recovery of a finder's fee whether based on an oral contract, an implied contract, or an attempted transformation of the June 20, 1966 Agreement and the August 31, 1966 Agreement.

Nor can the bar of the Statute be avoided by the Court's suggestion that a finder's fee is not a separate claim but "an equitable basis for determining the amount of damages." (A153). Equity can reform writings and deeds to give effect to the true intent of the parties, when the instrument fails to express that intent, but "(N)o court of equity could change the contract made by the parties or reduce to writing what rested in parol." Friedman & Co. v. Newman, 255 N.Y. 340, 347 (1931).

POINT III

THE JUNE 20, 1966 AGREEMENT WAS VOID UNDER NEW YORK GENERAL BUSINESS LAW § 340 AS AN UNREASONABLE RESTRAINT OF TRADE

The June 20, 1966 Agreement attempted to restrict Ashton's freedom to deal with Transign and Youngblood, it had no time limit contained in it and it purported to prevent Ashton from dealing with Transign in any capacity.

New York General Business Law Section 340 provides, in part:

> "Every contract, agreement, arrangement or combination whereby ... the free exercise of any activity in the conduct of any business, trade, or commerce or in the furnishing of any service in this state is or may be restrained ... is hereby declared to be against public policy, illegal and void."

All agreements which restrict the free exercise of any business activity are subject to this provision, and can be held valid only if they are both necessary to protect a legitimate interest of the promisee and reasonable in scope.

The New York cases under Section 340 have held that it is the plaintiff's burden to show that the restriction protects a legitimate interest. In Paramount Pad Co., Inc. v. Baumrind, 4 N.Y. 2d 393 (1958), the plaintiff sued the individual defendant, one of its former employees, for breach of a contract which required him, among other things, to obtain the written permission of the plaintiff before he could accept any position in the shoulder pad industry. The Court dismissed the complaint, holding (p. 396-397):

> "The restrictions set forth in the agreement exceed the degree of protection to which Paramount was entitled in order to preserve its legitimate interests. On its face the agreement unreasonably prevents the former employee, Baumrind, from pursuing his occupation where no harm would come to Paramount. Where the restraint imposed is more extensive than the legitimate interests sought to be protected, the restraint is invalid ...
>
> "This contract is contrary to the public policy of the State (General Business Law, § 340). Hence an action may not be maintained for its breach, nor for inducing its breach." (Emphasis added.)

In Big Top Stores, Inc. v. Ardsley Toy Shoppe, Ltd., 64 Misc. 2d 894, 904 (Sup. Ct. Westchester Co. 1970), the Court held that certain tying arrangements entered into

in connection with franchise agreements were unlawful and unenforceable. The Court held that once the restrictive arrangements were established, "the burden fell on the plaintiff to justify the arrangement as reasonably necessary to protect its good will and property rights in its trade name."

And in Larido Corp. v. Crusader Manufacturing Co., 4 Misc. 2d 231 (Sup. Ct. N.Y. Co. 1956), the plaintiff had purchased 100,000 bonnets from the defendant and the defendant had agreed not to manufacture any similar bonnets for anyone for a period of three years. The Court held that the restriction was greater than necessary for the protection of the plaintiff's interest in the purchased goods.

The New York authorities are in accord with the general rule prevailing in other jurisdictions, as stated in 91 A.L.R. 980 (1934) that:

> "[A] contract, even though only partially in restraint of trade, must, to be valid, be incident to or in support of some other contract or sale as to which the covenantee has an interest which is in need of protection."

Accord, Service Systems Corp. v. Harris, 41 A.D. 2d 20 (4th Dept. 1973).

In the present case, plaintiffs had no cognizable interest in preventing Ashton from dealing with Transign. Although they knew about the availablity of Transign in August 1965, they were never able to find financing. Moreover, after Youngblood had learned of their breach of his confidence, he decided to have nothing more to do with them, as he had a right to do.

The District Court's answer to this argument merely begs the question. Although the Court acknowledged that the Dessers had no legitimate expectation in September 1967 that they could purchase Transign, the Court stated (A143):

> "... they still did have a legitimate expectation that Ashton would not deal for Transign on his own in a manner which was unacceptable to them and which deprived them of any remuneration for the information which they had furnished to Ashton.

Defendants submit that the only "interest" which will support a restrictive agreement is a legitimate economic expectation of gain from its enforcement. A desire to prevent someone else from making a profit is not such an interest.

It should be kept in mind that Section 340 of the General Business Law represents a public policy

--in favor of free competition--of the "first magnitude." See, e.g., Columbia Gas v. New York State Electric & Gas Corp., 28 N.Y. 2d 117 (1971).

Plaintiffs' attempt to restrain Ashton from dealing with Transign after they ceased to have any interest to protect is a clear violation of this public policy and the Agreement dated June 20, 1966 should be declared void.

POINT IV

THE COURT ERRED IN AWARDING A FINDER'S FEE FOR BREACH OF THE JUNE 20, 1966 AGREEMENT

It is axiomatic that damages for a breach of contract are designed to place the injured party in the position that he would be in if the contract had been performed, not to give him more than he had bargained for.

In the present case, the purpose of the June 20, 1966 Agreement, which plaintiffs themselves drafted, was obviously to prevent defendant Ashton from taking away from plaintiffs a favorable deal which they hoped to make with Transign.

The duty imposed on Ashton was purely negative; the Agreement required him not to compete with plaintiffs for a purchase of Transign.

New York law strictly limits the damages which a plaintiff may recover for breach of a non-competition agreement to the profits which he would have made absent the breach. As the Court stated in Present v. Glazer, 225 App. Div. 23, 24 (4th Dept. 1928):

> "The damages recoverable for the breach of a covenant, in connection with a sale, not to engage in business in competition with the buyer are limited strictly to losses which the buyer sustains. The damages may include loss of profits and diminution in value of the property purchased."

The same measure of damages--loss of profits--was applied in the more recent New York case of Scientific Management Institute, Inc. v. Mirrer, 29 A.D. 2d 962 (2d Dept. 1968).

New York law in this respect is in accordance with the well-settled rule prevailing in other jurisdictions. As Williston stated, Williston on Contracts § 1406 at 589 (3rd ed. Jaeger, 1968) (footnotes omitted):

> "§1406. DAMAGES FOR BREACH OF NEGATIVE PROMISES. If the defendant's contract is to refrain from action, difficult questions often arise as to the value of his performance ...
>
> "A breach of a contract not to engage in business necessitates a valuation of the profits or the increased profits the plaintiff would have made had the defendant kept his contract."

The cases referred to by Williston illustrate the application of the rule. Thus, in Long v. O'Bryan, 91 S.W. 659 (Ct. App. Ky. 1906), the Court of Appeals

directed the trial court to instruct the jury on a new trial that damages should be limited to the profits which the plaintiffs lost. 91 S.W. at 660. In Clay v. Richardson, 38 S.W. 2d 849, 851 (Tex. Civ. App. 1931), the Court, quoting Page on Contracts § 3218, stated:

> "As said in 6 Page on Contracts, §3218: 'If one who has entered into a valid contract not to engage in a certain business breaks such contract and competes with the promisee, the only available measure of damages is the amount of profits which the promisee has lost by reason of such breach, together with the diminution in value, if any, of the property which the promisee purchased from the promisor' ...."

In Gregory v. Spieker, 42 P. 576 (Sup. Ct. Cal. 1895), the Court stated:

> "In cases like the present the damages are rarely susceptible of accurate proof, but the measure, expressed generally, is the value of the business lost to plaintiff, not the gain of defendant, which may be more or less than plaintiff's loss, though such gain may be considered in evidence.

Any measure of damages which gives the plaintiffs in this case something more than their lost profits for Ashton's breach of the June 20, 1966 Agreement

distorts the purpose of the Agreement and the expectations of the parties to the Agreement.

If Ashton had abided by the Agreement in strict accordance with its terms and had stayed away from Transign completely, that would not have changed Youngblood's attitude toward plaintiffs or given them the opportunity to participate in any deal with Transign. Thus, they lost nothing when Ashton dealt with Transign on its own and, if the Agreement had been strictly enforced, according to its terms, plaintiffs would have gained nothing.

POINT V

(IN OPPOSITION TO PLAINTIFFS' CROSS APPEAL)

THE COURT'S DECISION DISMISSING THE FIRST AND FOURTH CAUSES OF ACTION WAS BASED ON UNASSAILABLE FINDINGS OF FACT AND SHOULD BE AFFIRMED

Rule 52 of the Federal Rules of Civil Procedure provides:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses."

In the present case, the Court heard approximately seven days of testimony on liability and observed all of the plaintiffs and both of the individual defendants on the witness stand.

The Court based its dismissal of the first and fourth causes of action on several findings of fact which, far from being clearly erroneous, are amply supported by the record.

1. The Court dismissed the first cause of action because it found that there was no contract

and no fraud.

In its opinion, the Court found that plaintiffs had failed to prove a contract to purchase or sell securities and failed to prove fraud (A 136, A 161).

The testimony which plaintiffs themselves presented on the issue is replete with admissions that all of the negotiations with defendant Ashton for a potential purchase of securities were preliminary, that many essential terms of an agreement were unsettled, and that the parties looked toward the execution of a formal written document as the embodiment of a binding agreement (e.g. T.M. 178, 180, 312-313, 314, 320, 325, 341 and 493). Ashton's testimony that the parties had an "agreement in principle" to pursue a potential deal which would involve a 65/35 ownership split is not to the contrary, and Ashton's testimony supports the Court's finding that the parties did not intend to be bound until they could execute a formal agreement and obtain the approval of the British American board.

Moreover, the evidence supports the Court's finding that Ashton did not defraud plaintiffs in en-

tering into the June 20, 1966 agreement. Indeed, there is no evidence whatsoever, despite plaintiffs' allegations, to show that Ashton intended to breach the June 20, 1966 agreement at the time it was made. Indeed, he actively pursued the contemplated deal in which plaintiffs would be principals, until he learned that plaintiffs had deceived him and Youngblood and Youngblood decided not to deal with plaintiffs.

2. The Court dismissed the fourth cause of action because it found that Youngblood did not know of the contract between Ashton and plaintiffs until after it was breached and that he was privileged to deal with Ashton regarding his own property.

As described above, Youngblood did not know of the existence of plaintiffs' Exhibit 1 where he first invited Ashton to negotiate with him without the Dessers.

There can be no recovery for inducing breach of a contract absent proof of malice or use of improper means where the defendant, in inducing the alleged breach, acted to protect his own economic interest. Benton v. Kennedy-Van Suan Mfg. Corp., 2 A.D. 2d 27 (1st Dept. 1956).

Plaintiffs argue that a private business in-

terest does not give rise to a privilege. Plaintiffs misunderstand the law, because, while a mere prospective business advantage will not justify interference with a contract, a matured property right, or a present economic interest may be protected, even if that protection requires interference with a contract.

As the author states in Prosser, Law of Torts §123, at 969 (3d ed. 1964):

> "If [defendant] has a present, existing economic interest to protect, such as the ownership or condition of property, or a prior contract of his own, or a financial interest in the affairs of the person persuaded, he is privileged to prevent performance of the contract of another which threatens it...." (footnote omitted)

In the present case, it was clear that defendant Youngblood had created, built up and controlled Transign (Youngblood T.M. 780-781). It was his right to sell the company and, because of his medical condition, it was a necessity that he find an acceptable buyer. Although plaintiffs were given ample time to find financing for their purchase of Transign, they failed to do so. And, although defendant Ashton, acting as Youngblood's financial advisor, tried to find a buyer for Youngblood's company for more than six months after leaving British

American, he was unable to do so. Under the circumstances, where the only sale of Transign available to Youngblood was one which involved Ashton as a principal, Youngblood was entitled to disregard the restrictions which plaintiffs had attempted to place on Ashton, as the Court found.

Moreover, there was absolutely no proof in the record that Youngblood or Trans-Industries engaged in any affirmative conduct which caused Ashton to breach the alleged June 20, 1966 agreement.

There was no proof in the record whatsoever that defendant Youngblood ever suggested to defendant Ashton that he should form Trans-Industries or that he should purchase Transign on his own behalf or for his own account. Indeed, Youngblood engaged Ashton to find a buyer for Transign and Ashton attempted to do so over an extended period by bringing to Transign a number of potential deals in which he had no interest whatsoever. Trans-Industries was formed for the purpose of acquiring Transign. Its formation would have been the result, not the cause of the alleged breach of the June 20, 1966 agreement.

CONCLUSION

The judgment against defendant Ashton should be reversed, and the judgment dismissing the first, second and fourth causes of action should be affirmed.

Respectfully submitted,

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Service of Two copies of the within BRIEF

is acknowledged this 5TH day of AUG 1977

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